Supreme Court, U.S.
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91-786

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ERNEST L. CLARKE, *Petitioner*,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE, *Respondents*.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, after the Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), a plaintiff may maintain a cause of action against respondent employer under 42 U.S.C. § 1981 for racially motivated impairment of his right to enforce a contract of employment where, under the facts as alleged, respondent employer, for racial reasons, frustrated plaintiff's attempts to resolve grievances through non-judicial internal administrative processes.

2. Whether, after the Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) a plaintiff may maintain a cause of action under 42 U.S.C. § 1981 for racially motivated impairment of his right to make sales contracts where, under the facts as alleged, defendant employer of the plaintiff restricted plaintiff's sales to "blacks only" but placed no similar constraint upon its white sales representatives.

3. Whether, after the Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) a plaintiff may maintain a cause of action under 42 U.S.C. § 1981 for racially motivated impairment of his right to make a contract of employment where, under the facts as alleged, defendant employer refused to discuss the terms and conditions of open positions for which plaintiff was qualified after employer had advised plaintiff that his existing position was being eliminated.

4. Whether the petitioner was denied substantial justice through a combination of adverse rulings not supported by the facts, including (1) the granting of defendants' motion to transfer the case from Illinois to California, (2) the granting of the court's motion to dismiss the pendant state claims, (3) the denial of plaintiff's motion for entry of default and for default judgment for failure of defendants to timely answer or to otherwise plead, and for sanctions for failure

of defendants to timely prepare the case for trial, and (4) the granting of defendants' motion to dismiss.

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OPINION BELOW

The opinion of the Court of Appeals, was in the form of a Memorandum Decision, not approved for publication. It is reported as Table Case at 933 F.2d 1013, 1991 U.S. App. LEXIS 22733. The full text appears in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered by the Ninth Circuit Court of Appeals on May 28, 1991. Petition for rehearing was denied by order of the court entered on July 9, 1991. An order extending to November 6, 1991, the time within which to this petition for writ of certiorari may be filed was entered by this Court on October 2, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 42, § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The petitioner Ernest L. Clarke respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 28, 1991.

Mr. Clarke, a black Jamaican-American, alleged in his Second Amended Complaint that

the respondents, for racial reasons, engaged in conduct which impaired his ability to enforce his contract of employment with respondents, to make a new contract of employment with them, and to make certain sales contracts, in violation of 42 U.S.C. § 1981. The District Court dismissed Mr. Clarke's complaint for failure to state a cause upon which relief may be granted, based upon the 1989 Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). Mr. Clarke's claim against the corporate defendant, Loma Linda Foods, Inc., was also held to be barred by the applicable statute of limitations.

Mr. Clarke appealed from this decision to the Ninth Circuit on the basis of eight (8) separately identified issues, including the two which the District Court considered dispositive, i.e., the holding of Patterson, and the applicable statute of limitations. The Ninth Circuit affirmed the District Court,

but did so on the basis of the Patterson decision alone, leaving the statute of limitations question for another day.

Mr. Clarke is asking this Court to rule on the issue of whether, as a matter of law, under the facts as he has alleged, the he did state a claim upon which relief may be granted, the Patterson decision notwithstanding. These include factual allegations that the respondents (defendants) (1) by conscious misrepresentation and delay, denied petitioner access to administrative methods of enforcing his employment agreement, (2) refused to negotiate with Mr. Clarke regarding the terms and conditions of other open positions in the company for which he was qualified, and (3) impaired Mr. Clarke's ability to make sales contracts due to a policy of the company that restricted his sales to predominantly black communities only.

JURISDICTION IN THE LOWER COURTS

Jurisdiction over this matter in the U. S. District Court is based upon 28 U.S.C. § 1331 (federal question), and 42 U.S.C. § 1981. Jurisdiction in the United States Court of Appeals for the Ninth Circuit is based upon 28 U.S.C. § 1291 and upon Rules 3 and 4 of the Federal Rules of Appellate Procedure for final orders appealable as of right.

REASONS FOR GRANTING THE WRIT

1. The Court Below Failed to Give Due Emphasis to the Fact That the Primary Focus of the Patterson Case Is the "Contract" Aspect of 42 U.S.C. § 1981, Not With the Fact That the Case Arose in the Context of Employment, and As a Consequence Failed to Deal Fairly With Plaintiff's Allegations of Racially Motivated Impairment of Contract, and Created a Conflict With Another Court of Appeals.

For the petitioner Mr. Clarke, the most umfortunate aspect of the decision of the Supreme Court in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) is the fact that the case arose in the context of employment. Both the district court and the court of appeals analyzed Mr. Clarke's second amended complaint by considering first, last, and foremost that Mr. Clarke was an employee of Loma Linda Foods and concluded that since Patterson, Section 1981 could no longer be applied to the racially motivated misconduct complained of since it occured after the employment contract had been properly concluded.

Petitioner has urged that such an analysis is an unfounded though commonly held misperception of the holding of this Court in Patterson. Fortunately, most of the lower courts that have decided Section 1981 cases after Patterson appear not to have been so misled. Judging from the more than 120 cases

that have been reported from the lower federal courts, the courts have usually granted motions for summary judgment or for involuntary dismissal in those cases involving mere racial harrassment. See, for example, Khabo v. Linnon, 1991 U.S. Dist. LEXIS 7014. However, in other cases such as those in which a distinguishbly new contract is involved, the courts have found that the plaintiff may still maintain a cause of action. See, for example, DeBailey v. Lynch, 734 F.Supp. 974 (M.D.Fla. 1990).

But there is some genuine inconsistency and confusion in the lower courts, especially at the trial court level, on the application of Patterson. Of particular interest in the present case is the fact that although most courts would appear to hold that discrimatory disharge is no longer actionable under Section 1981, the Eighth Circuit in Hicks v. Brown, 902 F.2d 630 (8th Cir. 1990) has held that such discharges directly affect the right to

make contracts, and is therefore cognizable under Section 1981.

Mr. Clarke, also alleged racially motivated discharge, but he alleges other things that are even more compelling--that defendants frustrated his attempts to access the internal grievance process so that he might "enforce" his contract under Section 1981, and that they denied him his Section 1981 right to "make" a new contract by refusing to discuss the terms and conditions, or otherwise consider him for other open positions after being notified that his existing position was being eliminated. If the lower court had evaluated Mr. Clarke's allegations strictly from the "contract" point of view, and not from the "employment" point of view, Mr. Clarke's action may have been allowed to stand, and the conflict with the Eighth Circuit in Hicks may have been avoided.

2. The Decision Below Failed to Properly Consider That the Patterson Decision Limiting 42 U.S.C. § 1981 to Cases Involving the Making and Enforcing of Contracts Does Not Grant an Immunity to Employers Who Impair the Right of Employee Sales Representatives to Make Sales Contracts.

In a straight Section 1981 "contract" analysis, Mr. Clarke would certainly have a cause of action against anyone who tried to restrict his sales (contract) activities, as a black salesman, to predominantly black neighborhoods only. To hold his employer and its agents to a lesser standard is to suggest that employers are granted a certain immunity from Section 1981 claims by virtue of the employment relationship. This is precisely the analysis that should have been applied by the lower courts. Instead, the lower courts

took the view that such an analysis was put forth by Mr. Clarke simply as an attempt to avoid the "strictures" of Patterson, giving still further evidence of a strong disinclination to view Mr. Clarke as a person with contract rights under Section 1981, but simply an employee complaining of racial harassment.

Indeed, this attempt by Mr. Clarke to apply the language of Section 1981 in a straightforward and narrow manner is entirely consistent with this Court's reasoning in the Patterson case.

3. The Decision Below Is Patently Inconsistent With Findings of Fact or With Facts That Are Not Controverted.

The lower courts, whether for reasons already suggested or otherwise, ignored or misstated several important factual matters about which there could be no dispute. The

result was a denial of substantial justice to Mr. Clarke related to venue, to costs and inconvenience, and undue delay. For example, in approving the decision by the District Court for the Northern District of Illinois to make a Section 1406 transfer of Mr. Clarke's case to the Central District of California, the Ninth Circuit completely overlooks the fact that Mr. Clarke never complained about any acts which took place at a certain meeting in California regarding the decision by defendant Loma Linda Foods to close its Great Lakes Territory. Mr. Clarke does complain of subsequent acts that deviated from the decision announced at that meeting, acts which did not take place in California, but rather in Illinois and certain east coast locations.

Other rulings adverse to Mr. Clarke, but not supported by the facts, include (1) the granting of the court's motion to dismiss the pendant state claims, (2) the denial of plaintiff's motion for entry of default and

for default judgment for failure of defendants to timely answer or to otherwise plead, and for sanctions for failure of defendants to timely prepare the case for trial, and (3) the granting of defendants' motion to dismiss.

CONCLUSION

WHEREFORE, petitioner Ernest L. Clarke respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit as entered in this proceeding on May 28, 1991.

Respectfully submitted,

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November 6, 1991

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST L. CLARKE,	)	
	)	No. 90-55284
Plaintiff-Appellant,	)	
	)	D.C. No. CV-88-1403-RB
v.	)	
	)	
LOMA LINDA FOODS, INC.; LARRY BOGGESS, TED O. COOK; NABIL RAZZOUK; ADAM SCHLERETH; and JAMES SMEENGE,	)	MEMORANDUM*
Defendants-Appellees.	)	

Appeal from the United States District Court for the Central District of California
Robert C. Bonner, District Judge Presiding

Argued and Submitted May 6, 1991
Pasadena, California

Before: NORRIS, LEAVY, and TROTT, Circuit Judges.

Ernest L. Clarke appeals the district court's dismissal of his second amended complaint claiming racial discrimination in employment under 42 U.S.C. § 1981. Clarke

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

alleges that his employer, Loma Linda Foods, and certain officials thereof impaired his ability to make contracts on the basis of race. We affirm.

DISCUSSION

I. Transfer of Venue

Clarke first contends that the United States District Court for the Northern District of Illinois erred by transferring venue to the Central District of California pursuant to 28 U.S.C. § 1391.[1] Section 1391 states:

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[1] The appellees assert that we should not consider this issue on appeal because Clarke's Notice of Appeal lists the transfer order of November 18, 1987, as the order to which he assigns error, when in fact it was the order of February 25, 1988, on which the case was actually transferred. We disagree. We have held that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced or misled by the mistake." United States v. One 1977 Mercedes Benz, 708 F.2d 444, 451 (9th Cir. 1983). We find that Clarke's intent to appeal from the February 25, 1988 transfer order can be fairly inferred and that the appellees have not been prejudiced by the mistake.

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

28 U.S.C. § 1391(b) (1988). Here, the parties agree that all the defendants did not reside in one state or judicial district. Hence, venue is only proper in the judicial district "in which the claim arose." Id.

Clarke maintains that the discriminatory acts complained of took place in Illinois. The appellees assert that all the operative decisions and conduct that Clarke complains of took place in California. In cases in which it is not clear that the claim arose in only one specified district, the Supreme Court has stated that:

> a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility--in terms of the availability of witnesses, the accessibility of other relevant evidence, an the convenience of the defendant (but not the plaintiff)--may be assigned as the locus of the claim.

Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1979).

The district court transferred Clarke's action to the Central District of California pursuant to 28 U.S.C. § 1406(a). A transfer under section 1406(a) is proper only is venue is improper in the transferor court. Central Valley Typographical Union No. 46 v. McClatchy Newspapers, 762 F.2d 741, 744 (9th Cir. 1985). The district determined that under Leroy, Clarke's action arose in California, not Illinois.

We review the district court's determination of where the claim arose de novo. Id. at 745.

We hold that the district court did not err by transferring Clarke's action to the Central District of California. We agree with the district court's finding that all the operative decisions and conduct by Loma Linda Foods, Clarke's previous employer and the primary defendant in this action, and by its

co-defendant personnel took place in California. Loma Linda Foods is a California-based corporation. The meeting at which it was determined that the Great Lakes Sales Territory, for which Clarke was one of three sales representatives, would be closed took place in California. The decision that Clarke's new sales territory would be in New York was made in California. These events culminated in a dispute between Clarke and Loma Linda Foods that eventually led to his constructive termination. In light of the Supreme Court's guidance in Leroy to the effect that "the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not the plaintiff)" will be considered, we agree with the district court that Clarke's claim does not meet the test of being of "approximately equal plausibility." See Leroy, 443 U.S. at 185. We therefore conclude that venue was improper in Illinois, and that

the district court's transfer of Clarke's action to the Central District of California was not error.

II. Dismissal of Pendant State Law Claims

Clarke also contends that the district court abused its discretion by dismissing his pendant state claims. Clarke asserts that these state claims, alleging breach of contract, breach of the covenant of good faith and fair dealing, and intentional interference with contract, share a common nucleus of operative pact with the federal claims and therefore should not have been dismissed.

We review a district court's decision to dismiss pendent state claims for abuse of discretion. Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1421 (9th Cir. 1988).

The Supreme Court has cautioned that:

> pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. It's justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present

> a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties..."

United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (footnote and citation omitted). Here, the district court dismissed the claims upon the reasoning that the state law claims would predominate in the lawsuit and result in decisions of California law, that the state law claims would require substantial additional evidence at trial, that a jury would be confused by the separate causes of action, and that judicial economy would not be served by retaining the pendant claims. Under these guiding principles and upon review of the record, we conclude that the district court did not abuse its discretion by dismissing the pendent state claims.

III. Dismissal of Clarke's Action

Clarke next contends that the district court erred by dismissing his action. The

district court dismissed Clarke's action upon finding that Clarke's claim for racial discrimination was protected by 42 U.S.C. § 1981 as construed by the Supreme Court in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) and that in the alternative, Clarke's action was barred by the applicable statute of limitation. Clarke argues that the Supreme Court's decision in Patterson v. McLean Credit Union does not affect his claims of racially motivated impairment of contract under section 1981. Clarke also asserts that the district court applied an incorrect statute of limitations to his action, and even if it did not, that appellees waived the affirmative defense of statute of limitations.

We review the dismissal of a complaint without leave to amend de novo. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

Section 1981 protects the rights of all persons, regardless of race, "to make and

enforce contracts." 42 U.S.C. § 1981 (1988). In Patterson v. McLean Credit Union, the Supreme Court redefined the scope of section 1981, finding that it protects just two rights: (1) the right to make contracts, and (2) the right to enforce contracts. Patterson 109 S.Ct. at 2372. The right to make contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." Id. at 2372-73. Section 1981's guarantee of the right to enforce contracts serves to:

> prohibit[] discrimination that infects the legal process in ways that prevent one from enforcing contract rights [and] also covers wholly private efforts to impede access to the courts or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract.

Id. at 2373. However, the right to enforce contracts does not extend beyond "conduct by an employer which impairs an employee's

ability to enforce through legal process his or her established contract rights." Id.

Here, Clarke claims intentional discrimination on the basis of race as a result of eleven incidents. Clarke's first cause of action involves his reassignment from a sales area which included the northwestern suburbs of Chicago, a middle-class, predominantly black community, to the south side of Chicago, a predominantly black community. Clarke alleges that the reassignment was racially motivated. Clarke's second cause of action involves the decision to close down the Great Lakes Territory and reassign Clarke to an area encompassing a predominantly black community in New York City. Clarke alleges that these decisions were racially motivated. Clarke's third cause of action involves the appellees' alleged refusal to allow Clarke to transfer to one of the other open positions, again allegedly on the ground of race. Clarke's fourth cause of

action involves appellee's allegedly racially motivated giving of inaccurate and incomplete information regarding relocation assistance available to Loma Linda Foods employees. Clarke's fifth cause of action involves appellees' allegedly racially motivated decision to require Clarke to be present in his new position in New York City by June 3, 1985, on the threat of termination. Clarke's sixth through tenth causes of action repeat the allegations of the first five and assert additionally that these racially motivated actions impaired Clarke's right to make and enforce sales contacts in his work as a sales representative for Loma Linda Foods. Clarke's eleventh cause of action involves appellees' retrieval of the company car and product samples that were in Clarke's possession after he had been terminated. Clarke alleges that these actions were racially motivated and impaired his right to make and enforce sales contracts in his work as a sales

representative for Loma Linda Foods.

We conclude that the conduct about which Clarke complains is not protected by section 1981. Clarke does not contend that Loma Linda Foods or other named defendants prevented him from entering into a contract; indeed, it is clear from the face of Clarke's complaint that he was an employee of Loma Linda Foods. Rather, his complaints concerning the reassignment, transfer, refusal to allow him to transfer to a different territory, provision of inaccurate information concerning transfer, an the "constructive termination" all involve postformation conduct. As such, these complaints are not protected by section 1981. Id. at 2372-72; Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Nor does Clarke allege that appellees have impaired his ability to enforce his contract through the legal process or through any non-judicial method of adjudication. Clarke's contentions that appellees refused to

allow him to transfer to one of the two other open positions and provided him with inaccurate and incomplete information regarding relocation assistance available to Loma Linda Foods employees do not implicate his right of access to the courts. The Court in Patterson v. McLean Credit Union expressly held that alleged racial harassment that amounts to a breach of contract does not impair an employee's right to enforce his contract under section 1981. Patterson, 109 S.Ct. at 2376. Clarke does not charge that the appellees impeded his efforts to file any claims against them. Instead, as was the case in Overby, Clarke was free to and did pursue his claims of racial discrimination with the diligence he deemed appropriate. Overby, 884 F.2d at 473. Hence, we conclude that Clarke's complaints do not involve his right to enforce his employment contract under section 1981.

Clarke attempts to escape the strictures of Patterson v. McLean Credit Union, however,

by alleging that the allegedly racially actions taken by the appellees deprived him of his right to make and enforce sales contracts in his work as a sales representative for Loma Linda Foods. We reject this contention. Clarke was not a party to the contracts he made as a sales representative for Loma Linda Foods and therefore cannot claim that his rights to make these contracts were impaired by appellees' alleged discriminatory acts.

Accordingly, we affirm the district court's dismissal of Clarke's second amended complaint on the ground that it does not state a claim under section 1981 as construed by the Supreme Court in Patterson v. McLean Credit Union.[2]

IV. Default Judgment

Clarke next contends the district court

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[2] We do not reach Clarke's contention that the Supreme Court wrongly decided Patterson v. McLean Credit Union. Only the Supreme Court can overrule one of its precedents. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

erred by denying this motion for default judgment under Fed. R. Civ. P. 55(b)(2). The district court denied Clarke's motion for default judgment on the ground that Clarke had not secured an entry of default as required by Fed. R. Civ. P. 55(a). The district court also stated that Local Rule 14.12 required a party moving for a default judgment to state in declaration when and against whom the Clerk's default was entered. Clarke maintains that his motion for default judgment sought not only a default judgment but also the prerequisite entry of default as well. In Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986), we considered a similar situation in which an answer, though late, was filed on the same day as plaintiff's motion for a default judgment. We held that because plaintiff had not made a showing of prejudice as a result of the "failure to comply strictly" with the time requirements of the Federal Rules of Civil Procedure, we could not conclude that the

district court had abused its discretion by denying the motion. Id. at 924-25. Here, Loma Linda Foods timely responded to Clarke's second amended complaint by filing a motion to dismiss on October 4, 1989. See Fed. R. Civ. P. 6(e). The other named defendants joined in Loma Linda Food's motion to dismiss on October 9, 1989. Clarke filed his motion for default judgment on October 17, 1989. Clarke has made no showing of prejudice. Under these circumstances, we cannot conclude that the district court abused its discretion by denying motion for a default judgment.

V. Sanctions

Finally, Clarke contends that the district court erred by denying his motion for sanctions against the defendants for failure to prepare for trial. We reject this contention. We review the denial of a motion for sanctions for an abuse of discretion. Mackey v. Pioneer Nat. Bank, 867 F.2d 520, 526 (9th Cir. 1989). On the record before us, we

find that the district court did not abuse its discretion in denying the motion for sanctions.

AFFIRMED.

DATE FILED (STAMPED): May 28, 1991

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST L. CLARKE,	)	
	)	No. 90-55284
Plaintiff-Appellant,	)	
	)	D.C. No. CV-88-1403-RB
v.	)	
	)	
LOMA LINDA FOODS, INC.; LARRY BOGGESS, TED O. COOK; NABIL RAZZOUK; ADAM SCHLERETH; and JAMES SMEENGE,	)	ORDER
Defendants-Appellees.	)	

Before: NORRIS, LEAVY, and TROTT, Circuit Judges.

The petition for rehearing is DENIED.

DATE FILED (STAMPED): July 9, 1991

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ERNEST L. CLARKE, *Petitioner*,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE, *Respondents*.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1991, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to all parties required to be served, as follows:

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